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ABSTRACT

Case citations from federal and state court decisions concerning freedom of speech in schools are organized in five major sections with brief summaries of relevant cases in subcategories followed by a table of cases cited. The major sections are as follows: (1) "Employees' Freedom of Expression: Academic Issues" (Virginia Davis Nordin); (2) "Employees' Freedom of Expression: Non-Academic Issues" (Joseph M. Wilson); (3) "Student Expression: Non-Religious Issues" (Perry A. Zirkel); (4) Student Expression: Religious Issues" (Richard Fossey); and (5) "First Amendment Freedom of Expression: Access to Schools by Outside Individuals or Groups" (Gail Sorenson). (MLF)

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Case Citations
1994

SIXTEENTH Series (HOW FREE IS SPEECH IN THE SCHOOLS?)

Edited by Perry Zirkel, University Professor
Lehigh University

Number 1 — Employees' Freedom of Expression: Academic Issues. *Virginia Davis Nordin*

Number 2 — Employee's Freedom of Expression: Non-Academic Issues. *Joseph M. Wilson*

Number 3 — Student Expression: Non-Religious Issues. *Perry A. Zirkel*

Number 4 — Student Expression: Religious Issues. *Richard Fossey*

Number 5 — First Amendment Freedom of Expression: Access to Schools By Outside Individuals or Groups. *Gail Sorenson*

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EMPLOYEES' FREEDOM OF EXPRESSION: ACADEMIC ISSUES

SIXTEENTH Series, Number 1

Prepared by Virginia Davis Nordin, Associate Professor
University of Kentucky

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In 1971 in ***Mailloux v. Kiley***, 323 F. Supp 138 (D. Mass.) *aff'd.* 448 F.2d 124 (1st Cir. 1971), Judge Charles Wyzanski introduced the idea that teachers, like college professors, might have a legally protected right of academic freedom, perhaps following the lead of the United States Supreme Court in ***Pickering v. Board of Education***, 391 U.S. 563 (1968). In that decision, the Court held that a teacher's free speech right as a citizen, on matters of public concern could not be curtailed by the school district unless the speech directly interfered with daily working relations. This holding was extened in ***Givhan v. Western Consolidated School District***, 439 U.S. 410 (1979), to cover individual private conversations between a teacher and a principal as long as the speech related to matters of public concern. The exception for matters dealing primarily with employment issues was reaffirmed and enforced in ***Connick v. Myers***, 461 U.S. 135 (1983). The major issues in these cases continue to be refined in relation to old themes such as religion, and new themes such as sexual harassment. Much of the free speech protection relates to the rights of a teacher as a citizen to speak out on matters of public concern, rather than the development and extension of classroom academic freedom. The number of decisions that acknowledge the existence of a constitutional right of academic freedom for teachers, but find that right outweighed by other concerns or policies seem at present to weaken that concept, but may ultimately strengthen it through those acknowledgements.

Classroom Speech and Conduct

Religion & Science

A teacher's speech may be limited in order to achieve proper educational goals such as prohibiting controversial abortion presentations in a biology class. ***Ward v. Hickey***, 996 F.2d 448 (1st Cir. 1993).

A school district did violate a teacher's First Amendment rights by requiring the teaching of evolution and prohibiting creationist theory. ***Peloza v. Capistrano Unified Sch. Dist.***, 787 F. Supp. 1412 (C.D. Cal. 1992). Likewise, a school district may forbid the teaching on nonevolutionary theories of creation ***Webster v. New Lenox Sch. Dist.***, 917 F.2d 1004 (7th Cir. 1990).

Conduct in the classroom which endorses a particular religion infringes the rights of others and may be prohibited. School officials had directed an elementary teacher to stop the silent reading of the the Bible during classroom hours. ***Roberts v. Madigan***, 921 F.2d 1047 (10th Cir. 1990) *cert denied*, 112 S. Ct. 3025 (1992).

A district may legitimately prohibit a teaching technique, and violation of that rule by the teacher is not protected by the First Amendment. ***Bradley v. Pittsburgh Bd. of Educ.***, 913 F.2d 1064 (3d Cir. 1990). *See also*, 910 F. 2d 1172 (3d Cir. 1990).

Sexually Explicit or Questionable Materials

A teacher's right to choose classroom methodology under principles of academic freedom is modified by school officials' right to establish and apply their curriculum in such a way to transmit community values. ***Krizek v. Cicero-Stickney Sch. Dist.***, 713 F. Supp. 1131 (N.D. Ill. 1989); ***O'Connor v. Sobol***, 577 N.Y.S. 2d 716 (App. Div.1991).

A pre-existing rule is not necessary, nor is a showing of disruption. ***Krizek v. Cicero-Stickney Sch. Dist.***, 713 F. Supp. 1131 (N.D. Ill. 1989).

Tenured and untenured teachers could not be terminated for producing a commercial film of questionable content, utilizing school property and equipment with the principal's prior permission. ***Rothchild v. Board of Educ. of Buffalo***, 778 F. Supp. 642 (W.D.N.Y. 1991).

A school could reasonably find that showing an R-rated film to a high school class offended legitimate pedagogical concerns which outweigh the students academic freedom to learn. The school's function as provider of intellectual and moral guidance and transmitter of mores of the community justifies some imposition on limitations on classroom expression. ***Krizek v. Cicero-Stickney Sch. Dist.***, 713 F. Supp. 1131 (N.D. Ill. 1989).

A teacher could be reprimanded for referring, by name, to students "making out" on the tennis court even though the remark was true and was a spontaneous, illustrative response to a student question. ***Miles v. Denver Pub. Sch.***, 944 F.2d 773 (10th Cir. 1991).

General

Academic freedom is a recognized constitutional doctrine. ***Moody v. Jefferson Parish Sch. Bd.***, 2 F.3d 604 (5th Cir. 1993); ***Krizek v. Cicero-Stickney Sch. Dist.***, 713 F. Supp. 1131 (N.D. Ill. 1989); O'Connor v. Sobol, 577 N.Y.S. 2d 716 (App. Div. 1991); ***Webster v. New Lenox Sch. Dist.***, 917 F.2d 1004 (7th Cir. 1990).

A non-tenured teacher's conduct in allowing articles in a school newspaper which the principal felt negatively portrayed the school, refusing to retract them and advising students of their right to refuse to retract is protected by the First Amendment. ***Webster v. New Lenox Sch. Dist.***, 917 F.2d 1004 (7th Cir. 1990).

A teacher's First Amendment rights to speak candidly in class in response to a student question, are outweighed by a school's competing interest in suppressing the statement for policy reasons. A written reprimand may be issued. ***Miles v. Denver Pub. Sch.***, 944 F.2d 773 (10th Cir. 1991).

A directive to a teacher that his grades not deviate more than 2% from distributions in other classes was an inappropriate interference with the teacher's legitimate need for classroom flexibility. ***In re Temination of Johnson***, 541 N.W.2d 343 (Minn. Ct. App. 1990).

Academic Freedom Outweighed by Other Factors

Although academic freedom is a recognized constitutional doctrine, a teacher who supervised a class newspaper which caused faculty dissension could be reprimanded and transferred as an exercise of proper educational administration since there was evidence of inadequate supervision, wilful neglect and violation of financial policy by the teacher. ***Moody v. Jefferson Parish Sch. Bd.***, 2 F.3d 604 (5th Cir. 1993).

A teacher who complained about dangerous chemicals stored in the school and lack of approval for student field trips had no constitutional protection where the jury found that the board would not have renewed the contract regardless of the complaints. ***Ingrum v. Nixa Reorganized Sch. Dist. R-2***, 966 F.2d 1232 (8th Cir. 1992).

A school district's directive to a mathematics teacher that his grade distribution not deviate by more than 2% from distributions in other classes was an inappropriate interference with the teacher's legitimate need for classroom flexibility, but the teacher committed insubordination warranting discharge when he made no effort to comply with specific directive that he improve his relationship and rapport with students and parents, and provide worksheets containing assigned problems instead of having students copy them off the board, and furnish each student with copies of tests and material used to supplement the textbook. ***In re Termination of Johnson***, 541 N.W.2d 343 (Minn. Ct. App. 1990).

A single directive by a superintendent to a teacher regarding not speaking out about students' standardized test scores may violate free expression but does not by itself make the district liable for failure to promote. ***Partee v. Metropolitan Sch. Dist.***, 954 F.2d 454 (7th Cir. 1992).

Whether protected conduct is a substantial or motivating factor is a jury question. The teacher in this case was unconstitutionally disciplined for publishing the results of a survey by a high school senior showing that teachers were dissatisfied with an experimental merit pay arrangement. ***Warren v. New Hanover County Bd. of Educ.***, 797 P.2d 768 (Colo. Ct. App. 1990).

An untenured teacher could not allege that her dismissal was in fact unconstitutional censoring of her history supplementary reading list since she had disregarded approval procedures and no matter of public concern was involved. ***Kirkland v. Northside Indep. Sch. Dist.***, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2620 (1990).

Public Concern

Sexual Harassment

A physical education teacher's letter to the school newspaper responding to allegations of sexual discrimination in the physical education program was a matter of public concern and protected by the First Amendment. ***Seemuller v. Fairfax County Sch. Bd.***, 878 F. 2d 1578 (4th Cir. 1989).

A report to the principal of complaints of sexual harassment by a teacher is a matter of public concern and hence protected speech under the First Amendment. ***Cromley v. Board of Educ. of Lockport***, 699 F. Supp. 1283 (N.D. Ill. 1989).

Academic Issues Related to School Administration

A number of recent cases have held that teacher speech regarding employment issues is not speech relating to matters of public concern and therefore is not entitled to constitutional protection. ***Gabel v. Jefferson County Sch. Dist.***, 824 P.2d 748 (Colo. Ct. App. 1991); ***Hess v. Board of Educ.***, 848 F.2d 748 (7th Cir. 1988); ***Ingrum v. Nixa Reorganized Sch. Dist. R-2***, 966 F.2d 1232 (8th Cir. 1992).

A non-hired substitute teacher engaged in protected free speech when she criticized the quality of teachers who were hired. ***Mazurek v. Wolcott Bd. of Educ.***, 815 F. Supp. 71 (D. Conn. 1993).

A teacher and union activist who published the results of a high school senior's survey which indicated that teachers were dissatisfied with an experimental merit pay program was protected by the First Amendment and could not be disciplined. ***Warren v. New Hanover County Bd. of Educ.***, 410 S.E.2d 232 (N.C. Ct. App. 1991).

Other

A teacher's speech regarding the content of a supplementary reading list for a history class is not a matter of public concern. ***Kirkland v. Northside Indep. Sch. Dist.***, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2620 (1990).

A teacher's speech at a public meeting concerning the school's method of punishing students at a time when the community was greatly interested in discipline policy, was constitutionally protected. ***Rankin v. Independent Sch. Dist.***, 876 F.2d 838 (10th Cir. 1989) *cert. denied*, 111 S. Ct. 786 (1990).

A teacher's letter to a state department of education complaining of delay in implementing programs for handicapped students is protected as a matter of public concern. ***Southside Pub. Sch. v. Hill***, 827 F.2d 270 (8th Cir. 1987) *on remand*, 688 F. Supp. 493 (E.D. Ark. 1988).

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Case Citations
EMPLOYEES' FREEDOM OF EXPRESSION: NON-ACADEMIC ISSUES

SIXTEENTH Series, Number 2

Prepared by Joseph M. Wilson, Professor of Legal Methods
Widener University School of Law

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The following cases focus on a K-12 public schools employee's First Amendment right to free expression regarding matters other than those which the courts have treated as primarily academic. In these cases the employee's primary complaint is that the employers has or will take an adverse employment action such as non-renewal, dismissal, transfer, or other disciplinary measure which will deprive or chill employee's exercise of those rights.

Most of this section is devoted to cases to which courts have applied all or part of a multi-test analysis based on ***Pickering v. Board of Educ.***, 391 U.S. 563 (1968), ***Connick v. Myers***,461 U.S. 138 (1983), and ***Mt. Healthy v. Doyle***, 429 U.S. 274 (1977). The cases are organized by headings which paraphrase the various tests. In a few instances, a court has made more than one holding in the same case. When this has occurred, the cases are listed under more than one heading.

Courts have decided a relatively few "expression" cases on the ground that the school employee's right to free expression has not been effected by the adverse action. Those cases are grouped under the heading, "Expression or Conduct Not Protected by First Amendment." Because of the large number of free expression case reported, only those decided in 1985 or after are included below.

Matters of Public Concern

The first test in the ***Pickering, Connick, Mt. Healthy*** analysis required an employee to establish that, as a matter of law, his expression pertains to "a matter of public concern." In ***Connick***, the Supreme court most clearly articulated the test for "public concern." The question is treated as a matter of law for the court to decide and is whether the employee's speech can be "fairly characterized as relating to any matter of political, social, or other concern to the community" in light of the "content, context, and form" in which it is expressed. In each of the cases listed here, the court's characterization of the employee's expression as being either "of" or "concerning public matters" was dispositive.

Teacher's criticism of superintendent on television and in letter addressed to him was of public concern. ***Blackburn v. Floyd County Bd. of Educ.***, 749 F. Supp. 159 (E.D. Ky 1990).

Special education teacher's spoken and written comments to state agency regarding proposed special education regulations were protected. ***Berlin v. Superintendent of Pub. Instruction***, 448 N.W.2d 764 (Mich. Ct. App. 1989).

Teacher's running for election as school superintendent and lobbying for legislation changing the manner by which superintendents were selected were protected activities. ***Holley v. Seminole County Sch. Dist.***, 755 F.2d 1492 (11th Cir. 1985).

Substitute teacher and candidate for English teaching position's criticism of district's hiring a social studies teacher to fill the position raised an issue of public concern. ***Lees v. West Greene Sch. Dist.***, 632 F. Supp. 1327 (W.D. Pa. 1986).

Teachers' complaints to principal and principal's superiors that principal had been insufficiently specific regarding her discipline policy should be given constitutional protection. ***Morfin v. Albuquerque Pub. Sch.***, 906 F.2d 1434 (10th Cir. 1990).

Would-be-substitute teacher's public complaint that the school committee acted improperly in not hiring her was a public concern and the partisan political activity she engaged in was inherently of public concern. ***Smith v. Harris***, 560 F. Supp. 677 (D.R.I 1983).

School nurse's complaints to supervisors and the superintendent regarding staffing, nursing space, and district's failures to follow immunization regulations were regarding matters of public concern. ***Stever v. Independent Sch. Dist. No. 625***, 943 F.2d 845 (8th Cir. 1991).

Teacher's satiric letter to the school newspaper responding to student allegations of sex discrimination by teachers of physical education addressed a matter inherently of public concern. ***Seemuller v. Fairfax County Sch. Bd.***, 878 F.2d 1578 (4th Cir. 1989).

Teacher's allegation in a public speech that a colleague's transfer was made by the school board for political reasons spoke to an issue of public concern. ***Wichert v. Walter***, 606 F. Supp. 1516 (D.N.J. 1985).

Matters of Private Concern

In the cases cited here, courts have found conduct or expression which did not meet the "public concern" test. Thus, the speech or conduct was deemed to be of or about matters of "private concern." Consequently, it did not earn the employee constitutional protection from retaliation.

Coach's implied complaint that teams's unsatisfactory showing resulted from poor administrative support was not a matter of public concern because coach did not intend to encourage public debate. ***Adkins v. Stow City Sch. Dist.***, 591 N.E.2d 795 (Ohio Ct. App. 1990).

An employee's efforts to make public a dispute with district administrators was not protected. ***Alinovi v. Worcester Sch. Comm.***, 777 F.2d 776 (1st Cir. 1985).

Teacher's threat to sue school officials if he was not appointed department chair was not protected. ***Coyne v. City of Somerville***, 972 F.2d 440 (1st Cir. 1992).

Teacher's grievance of a performance evaluation was a private concern. ***Day v. South Park Indep. Sch. Dist.***, 786 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

Teacher's objections regarding his assignments and the placement of teachers in his department were not protected. ***Ferrara v. Mills***, 781 F.2d 1508 (11th Cir. 1986).

Neither teacher's article in newsletter for union members incorrectly describing superintendent's positions on policy making procedures, teachers' salaries, hiring and dismissal policies nor her complaints regarding the scheduling of a training session were not protected. ***Gregory v. Durham County Bd. of Educ.***, 591 F. Supp. 145 (M.D.N.C. 1984).

Use of a grievance procedure to resolve a dispute between an administrator and supervisor regarding administrator's performance rating did not raise a matter of public concern. ***Griffin v. Thomas***, 724 F. Supp. 587 (N.D. Ill. 1989), *aff'd mem.* 929 F.2d 1210 (1991).

Cafeteria workers' complaints regarding working conditions, lack of overtime pay, and having to provide special services to school board were matters of private concern. ***Knowlton v. Greenwood Indep. Sch. Dist.***, 957 F.2d 1172 (5th Cir. 1992).

Teacher's refusal to perform hall duty on ground that it violated the democratic principles which he taught was a private matter. ***Lockhart v. Board of Educ.***, 735 P. 913 (Colo. Ct. App. 1986).

Teacher's refusal to participate in job sharing arrangement and her complaint at a school board meeting that such arrangements negatively affected the quality of education in the district did not involve matters of public concern. ***Renfroe v. Kirkpatrick***, 722 F.2d 714 (Ala. Ct. App. 1983).

Attempting to convince a rival for a teaching position not to take the job is not protected expression. ***Smith v. Harris***, 560 F. Supp. 677 (D.R.I 1983).

Teacher's allegation that superintendent's conduct had incited student discontent did raise an issue of public concern. ***Stevenson v. Lower Marion County Sch. Dist.***, 327 S.E.2d 656 (S.C. 1985).

Coach's public comments on his performance interpreted as critical of administrators does not raise an issue of public concern. ***Vukadinovich v. Board of Sch. Directors***, 978 F.2d 403 (7th Cir. 1992).

Non-Disruptive Expression

Under ***Pickering*** and its progeny, if "public concern" is established a court must balance "the interest of the [employee] as a citizen [against] the intersts of the state as an employer in promoting the efficiency of the public service it performs throught its employees."

Because the Court in ***Pickering*** deemed it neither appropriate nor feasible to provide a definitive list of the factors to be weighed, the range of factors considered by courts has become broad. The primary thrust of each inquiry appears to be to what degree has or might the school's operations be disrupted by employee's conduct?

The cases cited here are ones in which a court found both that the employee's conduct was entitled to protection and that the expression was not so disruptive to operations that the state's interest must outweigh the employee's rights. Accordingly, any adverse action by the employing school district was held to violate the First Amendment.

Communicating directly with school board members in apparent violation of superintendent's policy was not disruptive. ***Anderson v. Central Point Sch. Dist.***, 554 F. Supp. 600 (1982), *aff'd mem.* 746 F.2d 505 (1984).

Campaigning against incumbent elected superintendent and alleging the taking of improper reimbursements is protected and not disruptive of district operations. ***Bundren v. Peters***, 732 F. Supp. 1486 (E.D. Tenn. 1989).

Publicly protesting district's proposal to waive instructional days was not disruptive. ***Carrillo v. Rostro***, 845 P.2d 130 (N.M. 1992).

Public criticism of principal's policies and allegations that principal discouraged teacher innovation held not disruptive where teacher's united in support of criticism. ***Cox v. Dardanelle Pub. Sch. Dist.***, 790 F.2d 668 (8th Cir. 1986).

Mere attendance at meetings protesting closing of school was not disruptive of district operations. ***Hatcher v. Board of Pub. Educ.***, 809 F.2d 1546 (11th Cir. 1987).

Complaints and public protest against proposal to transfer wife and labeling superintendent as "unprofes-

sional" found not so disruptive that constitutional protection forfeited. ***Lewis v. Harrison Sch. Dist.***, 805 F.2d 310 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987).

District could not take adverse action against an employee who testifies against district interests while under subpoena. ***Reeves v. Claiborne County Bd. of Educ.***, 828 F.2d 1096 (5th Cir. 1987).

Negative comments by substitute teacher and candidate for full-time position to parents regarding qualifications of rival candidates were not disruptive of district operations. ***Smith v. Harris***, 560 F. Supp. 677 (D.R.I. 1983).

District could not constitutionally terminate or discipline employee who protests district tax initiative by leaving meeting while superintendent is speaking. ***Stewart v. Baldwin County Bd. of Educ.***, 908 F.2d 1499 (11th Cir. 1990).

Teacher's signing letter to the state teachers' union requesting investigation of principal and alleging that principal had sexually harassed teachers and students did not impede district operations. ***Wren v. Spurlock***, 798 F.2d 1313 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987).

Disruptive Expression

The cases cited here are those in which a court found that the employee's conduct was either actually or potentionally so disruptive that the state's interest in providing efficient services outweighed the employee's right to communicate about a public issue.

Superintendent who openly opposed slate of school board candidates destroyed close working relationship required between board and superintendent and, thus, lost constitutional protection against board's retaliation. ***Kinsey v. Salado Indep. Sch. Dist.***, 950 F.2d 988 (5th Cir. 1992), *cert. denied*, 112 S. Ct. 2275 (1992).

District could take action against employee making false accusations against other employees in furtherance of a personal vendetta without violating constitution. ***Nieto v. San Perlita Indep. Sch. Dist.***, 894 F.2d 174 (5th Cir. 1990).

Teacher's recommendation to cancel play on ground that faculty director had not resolved racial issues among student cast held disruptive. ***Patterson v. Masem***, 774 F.2d 25 (8th Cir. 1985).

District could transfer teacher who reported case of suspected child abuse as required by law despite constitutional protection for teacher's conduct because negative community reaction disrupted school's operations. ***Raposa v. Meade Sch. Dist.***, 790 F.2d 1349 (8th Cir. 1986).

District could take action against teacher who violated an understanding to write positive articles and submit them for administrative review before publication because disruption caused outweighed teacher's right to comment on matter of public concern. ***Ridgeway v. Kiowa Sch. Dist.***, 794 P.2d 1020 (Colo. Ct. App. 1989).

District could take action against teachers for grieving the availability of supplies after allocation of supplies had been determined by contract negotiations and public budgeting process. ***Roberts v. Van Buren Pub. Schs.***, 773 F.2d 949 (8th Cir. 1985)

District could terminate teacher who wrote colleagues urging their participation in an illegal "sick out." ***Stroman v. Colleton County Sch. Dist.***, 981 F.2d 152 (4th Cir. 1993)

Protected Conduct Barring Negative Personnel Action

If a court finds that expression raises a matter of public concern and satisfies the balancing test, the employee must then prove that her conduct was a "substantial" or "motivating factor" in a negative action taken against her by employer. This quesion is treated as one of fact. The cases noted here are ones in which protected conduct was found to be a motivating factor in the district's action.

Board violated constitutional rights of employee who had campaigned for rival to incumbent school board member when it could not establish any other reasons for the firing. ***Durant v. Independent Sch. Dist. No. 16***, 990 F.2d 560 (10th Cir. 1990).

District violated employee's right of free speech where principal admitted that coach's negative predictions to newspaper that his African American athletes could not meet proposed college admission standards was substantial factor in principal's recommendation for involuntary transfer. ***Jett v. Dallas Indep. Sch. Dist.***, 798 F.2d 748 (5th Cir. 1986), *modified*, 491 U.S. 701 (1989).

Board's transfer of teacher after teacher's communications regarding board policies allegedly in violation of board policy against direct communications by employee's violated teacher's First Amendment rights. ***Knapp v. Whitaker***, 757 F.2d 827 (7th Cir. 1985).

Involuntary transfer violated employee's constitutional rights where employee had communicated to her superiors on matters of public concern and district could not establish any reason other than retaliation for its decision. ***Stever v. Independent Sch. Dist. No. 625***, 943 F.2d 845 (8th Cir. 1991).

District violated employee's First Amendment rights by failing to renew her contract after she filed complaint with federal Office of Civil Rights. ***Suber v. Bulloch County Bd. of Educ.***, 722 F. Supp. 736 (S.D. Ga. 1989).

District violated employee's First Amendment rights where members of school board know recommendation to terminate was retaliation for public criticism of district initiative and they failed to investigate any other ground for recommendation before acting. ***Ware v. Unified Sch. Dist. No. 492***, 902 F.2d 815 (10th Cir. 1989).

Protected Conduct Not Barring Negative Personnel Action

Mt. Healthy announced two rules. The first is described in the introduction to the previous section. The second applies if plaintiff prevails in showing that her protected is a substantial factor in the district's negative employment action. Once that showing is made, the employer may avoid liability only by proving it would have taken the same action absent the protected conduct. Both ***Mt. Healthy*** tests are considered questions of fact ather than questions of law. In the cases cited here, a finding has been made by the trier of fact against the complaining employee after applying one or the two rules.

Where employee's performance prompted numerous parent complaints and employee had been officially reprimanded for violating district policy, employee's exercise of First Amendment rights on an unrelated matter did not create constitutional barrier to termination. ***Cox v. Miller County R-1 Sch. Dist.***, 951 F.2d 927 (8th Cir. 1991).

Where teacher's court action to gain legal custody of former student from parent mother caused classroom performance to suffer and parents to refuse assignment of their children to his class, his exercise of First Amendment rights in connection with legal effort could not prevent district from terminating him. ***Kerin v. Board of Educ.***, 860 P.2d 574 (Colo. Ct. App. 1993).

District could choose not to renew probationary administrator for his refusal to implement curriculum without violating his First Amendment rights. ***Orshan v. Anker***, 550 F. Supp. 538 (E.D.N.Y. 1982).

District possessed such substantial reasons for not hiring candidate for full-time position that decision not to hire did not violate candidate's First Amendment rights despite her protected complaint against district's hiring procedures. ***Smith v. Harris***, 560 F. Supp. 677 (D.R.I 1983).

District could have reprimanded teacher for nature of materials he disseminated to students and required him to show administrator controversial materials in advance without violating teachers' free speech rights. ***Thompson v. Board of Educ.***, 711 F. Supp. 394 (N.D. Ill. 1989).

Expression Not Protected by First Amendment

The conduct of the employees in the cases listed here was held not to be protected under the First Amendment guarantee of freedom of expression. In reaching this conclusion, the courts deciding the cases used analyses other than that established by ***Pickering***, ***Connick***, and ***Mt. Healthy***. Accordingly, these cases are listed under this separate heading.

Superintendent could order teacher and coach not to associate with any of his students in teacher's professional capacity without depriving him of right to free speech. ***Cook v. Board of Educ.***, 671 F. Supp. 1110 (S.D. W. Va. 1987).

Employee did not have a constitutional right to make false charges against colleagues, to threaten to report colleagues, or to ignore procedure for registering complaints. ***Johnson v. Independent Sch. Dist. No. 3***, 891 F.2d 1485 (10th Cir. 1989).

Teacher possessed no right to display Bible or religious posters, conduct prayers, or tell biblical stories in class or to conduct religious services at school. ***May v. Evansville-Vanderburgh Sch. Corp.***, 787 F.2d 1105 (7th Cir. 1986)

Employee's first amendment rights were not involved in his attendance at school improvement team meetings where a report regarding school and district administration was prepared. ***Michelin v. Jenkins***, 704 F. Supp. 1 (D.D.C. 1989).

Teacher possessed no First Amendment right enabling him to repeat rumors of students' sexual misconduct to other students. ***Miles v. Denver Pub. Schs.***, 944 F.2d 773 (9th Cir. 1991).

Principal had no First Amendment right to make sexually oriented and offensive remarks to staff. ***Rabon v. Bryan County Bd. of Educ.***, 326 S.E.2d 577 (Ga. Ct. App.), cert. denied, 474 U.S. 855 (1985).

Teacher's writing about negative feelings of school staff in faculty newsletter otherwise devoted to social matters was not protected by the First Amendment. ***Sanguigni v. Pittsburgh Bd. of Pub. Educ.***, 968 F.2d 393 (3d Cir. 1992).

Teacher had no constitutional right to the appearance of a particular speaker in a student assembly program. ***Somitz v. Maine Sch. Admin. Dist.***, 495 A.2d 812 (Me. 1985).

Teacher's previously filing suit against district alleging violations of his First Amendment rights for the purpose of improving his individual employment circumstances did not create a constitutional bar to district taking personnel action against him. ***Sweeney v. Board of Educ.***, 746 F. Supp. 758 (N.D. Ill. 1990).

Prohibited Prior Restraint on Expression

District's rule prohibiting employee from discussion school issues with anyone other than a school principal was an unconstitutional prior restraint of free speech. ***Luethje v. Peavine Sch. Dist.***, 872 F.2d 352 (10th Cir. 1989).

Without first showing the existence of emergency or extraordinary circumstances, district could not invoke a policy or state statute to prospectively restrain an employee's speech. ***Unified Sch. Dist. v. McKinney***, 689 P.2d 860 (Kan. 1984).

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STUDENT EXPRESSION: NON-RELIGIOUS ISSUES

SIXTEENTH Series, Number 3

Prepared by Perry A. Zirkel
University Professor of Education and Law, Lehigh University

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The coverage is limited to the modern case law based on students' First Amendment freedom of expression, using the relatively recent landmark decisions, ***Bethel School District No. 403 v. Fraser***, 478 U.S. 675 (1986) and ***Hazelwood School District v. Kuhlmeier***, 484 U.S. 260 (1988) as the starting point. Thus, it does not include ***Tinker v. Des Moines Independent Community School District***, 393 U.S. 503 (1969) and its progeny prior to these two more modern landmarks. *See, e.g.*, ***Stanton v. Brunswick Sch. Dep't***, 577 F. Supp. 1560 (D. Me. 1984) (enjoining censorship, on grounds of appropriateness, of a student newspaper, as a "public forum"); ***Fricke v. Lynch***, 491 F. Supp. 381 (D.R.I. 1980) (invalidating prohibition against homosexual student taking male escort to senior prom where school district had not exercised less restrictive alternative of appropriate security measures). Similarly, it does not include student cases based on other First Amendment rights. *See, e.g.*, ***Crocker v. Tennessee Secondary Sch. Athletic Ass'n***, 980 F.2d 382 (6th Cir. 1992) (access to courts); ***Mozert v Hawkins County Pub. Sch.***, 827 F.2d 1058 (6th Cir. 1987) *cert. denied*, 484 U.S. 1066 (1988) (free exercise of religion).

Student Dress and Buttons

A school district may enforce, as reasonably related to the educational purposes of teaching community values and maintaining school discipline, a dress policy by prohibiting students from attending the prom in clothes of the opposite sex. ***Harper v. Edgewood Bd. of Educ.***, 655 F. Supp. 1353 (S.D. Ohio 1987).

Similarly, school officials may discipline students, without violating the First Amendment, for wearing a T-shirt to school that is lewd. ***Broussard v. School Bd.***, 801 F. Supp. 1526 (E.D. Va. 1992).

School officials may also effectively prohibit students from wearing a T-shirt clearly connected to the use of alcohol or drugs. ***Gano v. School Dist.***, 674 F. Supp. 796 (D. Idaho 1987).

School officials will also prevail with regard to T-shirts that are sexually suggestive. ***Pyle v. South Hadley Sch. Comm.***, 824 F. Supp. 7 (D. Mass. 1993).

On the other hand, school districts may not constitutionally prohibit students from wearing T-shirts where the alleged drug or alcohol connection is not reasonably perceived. ***McIntire v. Bethel Sch. Dist.***, 804 F. Supp. 1415 (W.D. Okla. 1992).

Dress-code rules, such as prohibiting male students from wearing earrings, are constitutional where there is a proven gang connection. ***Olesen v. Board of Educ.***, 676 F. Supp. 820 (N.D. Ill. 1987).

The same anti-gang justification will prevail for sports team apparel to the extent that the connection is proven. ***Jeglin v. San Jacinto Unified Sch. Dist.***, 827 F. Supp. 1459 (C.D. Cal. 1993).

School officials may not discipline students for wearing "scab" buttons during a teacher strike unless they prove a reasonable forecast of disruption. ***Chandler v. McMinnville***, 978 F.2d 524 (9th Cir. 1992).

A student dress code case that interweaves freedom of expression and freedom of religion is covered in the related *Case Citation* section on "Students' Freedom of Expression: Religious Speech." *See* ***Alabama and Coushatta Tribes v. Trustees of Big Sandy Indep. Sch. Dist.***, 817 F. Supp. 1319 (E.D. Tex. 1993). Although beyond the stated modern focus of this section, the earlier student grooming cases pointed in the current direction. *Compare, e.g.*, ***Davenport v. Randolph County Bd. of Educ.***, 730 F.2d 1395 (11th Cir. 1884); ***Humphries v. Lincoln Parish Sch. Bd.***, 467 So. 2d 870 (La. Ct. App. 1985) (upheld) with ***Graber v. Kniola***, 216 N.W. 2d 925 (Mich. Ct. App. 1974); ***Independent Sch. Dist. No. 8 v. Swanson***, 553 P.2d 496 (Okla. 1976) (invalidated). Similarly, a recent court decision based on freedom of speech under a state constitution reflects judicial non-intervention in student dress code disputes. *See* ***Colorado Indep. Sch. Dist. v. Barber***, 864 S.W.2d 806 (Tex. Ct. App. 1993).

School Symbols and Activities

School officials may cancel a school play that is sexually suggestive or otherwise contrary to community values. ***Bell v. U-31 Bd. of Educ.***, 630 F. Supp. 939 (D. Vt. 1986). For earlier case law, *see, e.g.*, ***Seyfried v. Walton***, 668 F.2d 214 (3d Cir. 1981) (upholding cancellation where curriculum-related).

The principal may constitutionally ban the confederate logo or mascot of a public school. ***Crosby v. Holsinger***, 852 F.2d 801 (4th Cir. 1988).

School officials may discipline a student for a lewd speech, here based on sexual innuendo, at a school assembly. ***Bethel Sch. Dist. No. 403 v. Fraser***, 478 U.S. 675 (1986).

The school administration may constitutionally disqualify a student as candidate for the presidency of the student council where the student made personally derogatory anti-administration comments at the

election assembly. ***Poling v. Murphy***, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990).

Similarly, school officials may exclude an outspoken student as candidate for student office where the reason was an insufficient sense of responsibility and maturity. ***Bull v. Dardanelle Pub. Sch. Dist.***, 745 F. Supp. 1455 (E.D. Ark. 1990).

A school regulation that prohibits students who participate in extracurricular activities from attending parties where alcohol is served does not violate their constitutional freedom of expression. ***Bush v. Dassel-Cokato Bd. of Educ.***, 745 F. Supp. 562 (D. Minn. 1990).

A requirement that students participate in community service as a prerequisite to high school graduation does not offend their constitutional freedom of expression. ***Steirer v. Bethlehem Area Sch. Dist.***, 987 F.2d 989 (3d Cir. 1993), *cert. denied*, __ U.S. __ (1993).

A requirement that student stand and recite the pledge of allegiance is constitutional in the absence of evidence of direct or indirect coercion. ***Sherman v. Community Consol. Sch. Dist.***, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, __ U.S. __ (1993). For early case law, *see, e.g.*, ***West Va. State Bd. of Educ. v. Barnette***, 319 U.S. 624 (1943); ***Lipp v. Morris***, 579 F.2d 834 (3d Cir. 1978); ***Goetz v. Ansell***, 477 F.2d 636 (2d Cir. 1973); ***Frain v. Baron***, 307 F. Supp 27 (E.D.N.Y. 1969).

Student Non-religious Publications

School officials may constitutionally censor a student newspaper or other school-sponsored student expression so long as their actions are reasonably related to legitimate educational concerns. ***Hazelwood Sch. Dist. v. Kuhlmeier***, 484 U.S. 260 (1988).

The burden is on the school authorities to show that the student newspaper is part of the curriculum or otherwise school-sponsored. ***Romano v. Harrington***, 664 F. Supp. 675 (S.D.N.Y. 1987), *further proceedings*, 725 F. Supp. 687 (E.D.N.Y. 1989). Another case where the ruling was limited to the teacher's standing on her own behalf is covered in the related *Case Citation* section on "Employee Freedom of Expression: Academic Freedom." *See* ***Moody v. Jefferson Parish Sch. Bd.***, 803 F. Supp. 1158 (E.D. La. 1992); ***Watson v. Eagle County Sch. Dist.***, 797 P.2d 768 (Colo. Ct. App. 1990).

Censorship of stylistically acceptable and inoffensively worded reviews of R-rated movies in a junior high school newspaper is not reasonably related to legitimate educational concerns. ***Desilets v. Clearview Regional Bd. of Educ.***, 630 A.2d 333 (N.J. Super. Ct. App. Div. 1993).

Where state law permits such action, school officials may censor a student newspaper that they reasonably believe to contain defamatory material. ***Leeb v. DeLong***, 243 Cal. Rptr. 494 (Cal. Ct. App. 1988).

School officials may discipline students for the disruptive contents of their underground newspaper. ***Bystrom v. Fridley High Sch.***, 686 F. Supp. 1387 (D. Minn. 1987), *aff'd mem.*, 855 F.2d 855 (8th Cir. 1988). For a pre-***Hazelwood*** ruling in an earlier, separate stage of the same case, *see* ***Bystrom v. Fridley High Sch.***, 822 F.2d 747 (8th Cir. 1987). For a ruling with a similar result in relation to an underground newspaper, *see* ***Williams v. Spencer***, 622 F.2d 1200 (7th Cir. 1980).

School officials may not discipline a student for distributing an underground newspaper on campus without the prior review that they require for school-sponsored publications. ***Burch v. Barker***, 861 F.2d 1149 (9th Cir. 1988).

A claim of retaliation against a student for a controversial article in the student newspaper requires the requisite factual predicate; a frivolous lack of proof may lead to an attorneys' fee award against the plaintiff student. ***Dangler v. Yorktown Cent. Sch.***, 771 F. Supp. 625 (S.D.N.Y. 1991), *attorneys fees*, 777 F. Supp. 1173 (S.D.N.Y. 1991).

School officials may reject family planning advertisements from a high school newspaper, yearbook, and athletic programs. ***Planned Parenthood v. Clark County Sch. Dist.***, 941 F.2d 817 (9th Cir. 1991).

School officials may not reject an ad for an anti-draft group where it allowed ads for military recruiters. ***San Diego Comm. Against Registration for the Draft v. Governing Bd.***, 790 F.2d 1471 (9th Cir. 1986).

Textbooks and Library Books

School authorities may discontinue a textbook, even for an elective course in high school, that they deem to be sexual and vulgar. ***Virgil v. School Bd.***, 862 F.2d 1517 (11th Cir. 1989).

School authorities may not discontinue textbooks from the curriculum where their motive is a narrow view of community values akin to a "pall of

orthodoxy." ***McCarthy v. Fletcher***, 254 Cal. Rptr. 714 (Cal. Ct. App. 1989). The major court decision involving this issue was ***Board of Education of Island Trees of Union Free School District No. 26 v. Pico***, 457 U.S. 853 (1982).

School officials may not remove non-obscene books from the library just because they perceive their content as offensive. ***Wexner v. Anderson Union High Sch. Dist.***, 258 Cal. Rptr. 26 (Cal. Ct. App. 1989).

Off-Campus Student Expression

School officials may not discipline a student for lewd expression that is not reasonably connected to the school or its activities. ***Klein v. Smith***, 635 F. Supp. 1440 (D. Me. 1986). In an earlier case, however, another court seemed to see such a connection when a student used foul language to a teacher in a public place. *See* ***Fenton v. Stear***, 423 F. Supp. 767 (W.D. Pa. 1976).

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Student Expression: Religious Issues

SIXTEENTH Series, Number 4

Prepared by Richard Fossey, Associate Professor of Law and Policy
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Number 4 in this series contains cases involving the right of students to engage in religious speech under the free speech clause at school. Although cases decided before 1982 are not included, the reader's attention is called to ***West Virginia State Board of Education v. Barnett***, 319 U.S. 624 (1943), in which the Supreme Court upheld the right of students who were Jehova Witnesses to refrain from saluting the flag at the school they attended.

Other delimitations are cases involving free speech claims brought by parents or community groups concerning religious speech. *See, e.g.*, ***Berger v. Rensselaer Cent. Sch. Corp.***, 982 F.2d1160 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2344 (1993) (distribution of Gideon Bibles, suit brought by a father); ***Fairfax Covenant Church v. Fairfax County Sch. Bd.***, 811 F. Supp. 1137 (E.D. Va. 1993) (challenging fee charged for school use; suit brought by the church). Also, omitted here are cases involving students' religious speech decided under the Equal Access Act or Constitutional provisions other than the free speech clause.

Student Religious Speech: Oral

A high school graduation ceremony was not a public forum that would permit the parent or student to force the school board to allow a prayer. Even if free speech rights or free exercise rights of student and minister father were violated, the school board's interest in avoiding an establishment clause violation outweighed the plaintiffs' interest in their free speech and free exercise rights. ***Lundberg v. West Monona Community Sch. Dist.***, 731 F. Supp. 331 (N.D. Iowa 1989).

The Fifth Circuit rejected, without addressing the merits, a First Amendment free speech claim brought by a high school valedictorian who was refused permission to give a religious speech at her graduation ceremony. The decision to reject the speech was not a reflection of school board policy. ***Guidry v. Broussard***, 897 F.2d 181 (5th Cir. 1990).

An elementary school classroom was not a public forum. Thus, a student was not entitled to make a religious presentation to classmates or to distribute a religious survey during school hours. The school authority's restrictions on the student's speech would be upheld if they were based on legitimate pedagogical concerns. ***Duran v. Nitsche***, 780 F. Supp. 1048 (E.D. Pa. 1991), *vacated as moot*, 972 F.2d 1331 (3d Cir. 1992).

In response to a lawsuit brought by students, a federal trial court entered a temporary restraining order prohibiting prayer at commencement. Other students moved to intervene in the lawsuit, asserting that the relief sought by the first group violated their right to free speech and free association. On appeal, the Third Circuit ruled that the second group was not entitled to intervene in the merit stage of the litigation and remanded for the trial court to determine whether intervention should be allowed in the remedial stage of the suit. ***Brody v. Spang***, 957 F.2d 1108 (3d Cir. 1992).

An elementary classroom was a closed forum during class hours, and school officials could regulate the content of classroom speech based on legitimate pedagogical concerns. Accordingly, a second grade student's free expression and free exercise rights were not violated when school authorities refused to allow her to show a videotape of herself singing proselytizing religious songs at show-and-tell. ***DeNooyer v. Livonia Pub. Schs.***, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd*, LEXIS No. 20606 (6th Cir. 1993).

A school board policy requiring an elementary school bible-study club to meet at 6:30 p.m. instead of directly after school did not violate the students' right to free expression. Granting the plaintiffs' requested meeting time would violate the establishment clause because a teacher affiliated with the club established a "symbolic nexus" between the school and the club. If the club met immediately after school ended, the court reasoned, the teacher's participation might cause students to understand the club to be under the school's aegis ***Quappe v. Endry***, 772 F. Supp. 1004 (S.D. Ohio 1991), *aff'd mem.*, 979 F.2d 851 (6th Cir. 1992).

Student Religious Speech: Publications

Although the school was entitled to enforce reasonable time, place, and manner regulations on students' distribution of literature, the restrictions were too narrowly drawn. By restricting the students' distribution of religious literature to the parking lot and sidewalk outside the school building, the school had violated the students' right to free speec. ***Thompson v. Waynesboro Area Sch. Dist.***, 673 F. Supp. 1379 (M.D. Pa. 1987).

A school district's ban on material proselytizing a particular religion was unlawful, but a fact dispute existed with regard to whether a religious newspaper had been distributed by students in a disruptive manner. ***Rivera v. East Otero Sch. Dist.***, 721 F. Supp. 1189 (D. Colo. 1989).

A school policy prohibiting distribution of non-school materials without prior review by the principal

was valid. Another policy, prohibiting distribution of religious or political material on school grounds, violated the free speech clause. ***Nelson v. Moline Sch. Dist. No. 40***, 725 F. Supp. 965 (C.D. Ill. 1989).

School hallways were intended to facilitate the movement of students and were a nonpublic forum. Thus, the school district was permitted to regulate the time, manner, and place of speech in the hallways, as long as the regulations were not content based. ***Hemry v. Sch. Bd.***, 760 F. Supp. 856 (D. Colo. 1991).

A high school was a limited public forum. A ban against material that proselytizes a religious or political belief was not narrowly drawn to meet a compelling governmental interest. A fact dispute existed with regard to whether a substantial disruption would recur if students were permitted to distribute religious literature on school grounds. In addition, particular sections of the school district's policy were invalid on the grounds that they gave school officials unbridled discretion to suppress protected speech in advance and because they contained no time limitation to ensure that prior review of nonschool material is suppressed only briefly. Finally, the court invalidated those sections of the district policy that only permitted distribution of nonschool materials at school exit doors at the end of the school day. Students should not be prohibited from distributing materials before school starts or at tables near the cafeteria during lunch time. ***Slotterback v. Interboro Sch. Dist.***, 766 F. Supp. 280 (E.D. Pa. 1991).

A school district's prior policy, forbidding the distribution of all religious material, violated the First Amendment as did a new policy, which explicitly prohibited the distribution of religious material that could be reasonably attributed to the school. The new policy also required students who wished to distribute more than ten copies of the same material to limit their distribution to a table set up for that purpose at times specified by the school was constitutional as was another policy that prohibited junior high students from distributing more than ten copies of materials prepared by nonstudents. ***Hedges v. Wauconda Community Unit Sch. Dist.***, 9 F.3d 1295 (7th Cir. 1993).

A school district violated students' right to free speech when it prohibited them from distributing religious tracts outside the school building before the start of the school day. A fact question existed concerning whether the students' proselytizing activities and religious meetings constituted a substantial disruption of school operations that would justify the district's prohibition. ***Clark v. Dallas Indep. Sch. Dist.***, 806 F. Supp. 116 (N.D. Tex. 1992).

An elementary principal refused to allow a fifth grade student to distribute religious literature to classmates and then discarded the literature. The student and her mother then sought an injunction prohibiting the school district from further interfering with the distribution of the literature by the student. The district court denied the motion on the grounds that the school district's policy on the distribution of religious literature had not yet been applied or perhaps even defined. ***Johnston-Loehner v. O'Brien***, 837 F. Supp. 388 (M.D. Fla.), *aff'd*, 7 F.3d 241 (11th Cir. 1993).

A school district refused to publish a student religious group's advertisement in the high school yearbook or to permit students to distribute the group's flyers on high school campuses. A religious group was a "private club" for purposes of the school district's policy prohibiting off-campus groups from functioning or advertising on campus, the court ruled. Thus, the district could withhold access to the group under a closed forum policy without violating the establishment clause or the Equal Access Act. ***Perumal v. Saddleback Valley Unified Sch. Dist.***, 198 Cal. App.3d 64, 243 Cal. Rptr. 545, *cert. denied*, 488 U.S. 933 (1988).

Student Symbolic Religious Speech

Wearing long hair was a "silent, passive expression of [Native American] faith and heritage," and was a protected, expressive activity that did not unduly disrupt the educational process. ***Alabama and Coushatta Tribes v. Trustees of Big Sandy Indep. Sch. Dist.***, 817 F. Supp. 1319 (E.D. Tex. 1993).

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First Amendment Freedom of Expression: Access to Schools By Outside Individuals or Groups

SIXTEENTH Series, Number 5

Prepared by Gail Sorenson, Professor
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Case coverage in this section includes only relatively recent First Amendment cases where individuals from the general public or membes of outsie groups (sometimes including students and/or faculty) sought access (1) to school facilities or buildings, (2) to avenues of communication sponsored by the school (e.g., the yearbook), or (3) to students themselves for purposes of communication (including the distribution of literature). Cases where free speech was a major ground for the decision will not be excluded merely because an additional ground was relied upon (e.g., establishment of religion); free speech, however, must have received primary emphasis. A substantial number of cases relying exclusively on the Establishment Clause were omitted; for examples of these, see ***Meltzer v. Board of Public Instruction***, 548 F.2d 559 (5th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) (distribution of Bibles by Gideons at central location as well as distribution in classrooms violated the Establishment Clause), and ***Ford v. Manual***, 629 F. Supp. 771 (N.D. Ohio 1985) (school district's rental of school buildings for weekday religious use immediately before and after school advanced religion). Also omitted were a few cases relying exclusively on the Free Exercise Clause and on the Due Process Clause: ***Verbena United Methodist Church v. Chilton County Board of Education***, 765 F. Supp. 704 (M.D. Ala. 1991) (school board required by Free Exercise Clause to rent school auditorium for baccalaureate service), and ***State v. Lyong***, 802 S.W.2d 590 (Tenn. 1990) (criminal tresspass statutes not sufficiently vague to deny due process to man convicted of preaching and distributing religious literature on school grounds despite request to leave).

Access to Buildings/Facilities During Non-School Time

In a situation where a school district permitted its facilities to be used by community groups for the discussion of issues related to family life, the exclusion of a group wishing to discuss family life and child-rearing from a religious point of view violated the First Amendment. Nor would permitting access to religious groups violate the Establishment Clause; such access would not suggest to the community that the district endorsed either religion in general or a particular religious creed. ***Lamb's Chapel v. Center Moriches Union Free Sch. Dist.***, 113 S. Ct. 2141 (1993).

A school district's refusal to rent the school gym to a group of students and parents wishing to sponsor a private baccalaureate ceremony was enjoined, in view of a policy allowing open public access. Such denial would violate First Amendment free speech rights. ***Chumway v. Albany County Sch. Dist. No. One***, 826 F. Supp. 1320 (D. Wyo. 1993).

Plaintiffs failed to get an injunction preventing Louis Farrakhan from speaking at a public fundraiser sponsored by a local school community organization and a mosque and taking place in a public school facility. The implicit Frist Amendment protection of an "ongoing political debate" was sufficient to outweigh any Establishment Clause concerns. ***S.A.F.E. v. Detroit Bd. of Educ.***, 815 F. Supp. 1045 (E.D. Mich. 1993).

A school district rented its facilities on weeknights and weekends to approximately 9,000 different community groups a year, arguing that the Establishment Clause required it to charge religious groups a higher rate for long-time, on-going rentals. The court held that such a practice violated the Free Speech Clause: Because the district had created a public forum, it could not discriminate against religious speech by charging a higher rental fee. ***Fairfax Covenant Church v. Fairfax County Sch. Bd.***, 811 F. Supp. 1137 (E.D. Va. 1993).

A pregnancy counseling organization was permitted to use public school facilities for a fund-raiser with a religious theme because the district, under First Amendment free speech principles, had created a limited public forum that included religious fundraisers. ***Travis v. Owego-Applachin Sch. Dist.***, 927 F.2d 688 (2d Cir. 1991).

Where a school district regularly made its facilities available to community groups, it could not deny use to a religious group desiring to offer a free Christmas dinner and evangelical message without violating the free speech rights of the group. Having created a public forum, religious speech could not be excluded. ***Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist.***, 941 F.2d 45 (1st Cir. 1991).

The leasing of a school auditorium to a nondenominational student group for baccalaureat services was appropriate because the facility had been maintained as an open forum for use by all civic groups, religious and nonreligious alike. There was no establishment clause violation. ***Randall v. Pegan***, 765 F. Supp. 793 (W.D.N.Y. 1991).

A school district that denied the Nationalist Movement the right to conduct a rally in a school parking lot did not violate the First Amendment. The decision was based on the fact that a basketball tournament had been previously scheduled and did not result from disagreement with the group's message. Furthermore, all parties agreed that the school parking lot was not a public forum in any case. (It should be noted that issues relating to the city proper were not discussed in this case.) ***Nationalist Movement v. City of Cumming***, 913 F.2d 885 (11th Cir. 1990).

A school district denied the use of school facilities to a nonprofit corporation that sponsored a summer religious program for children (but not to groups

meeting for non-religious purposes). Such action was not content-neutral and therefore violated free speech principles applicable in a designated public forum. ***Youth Opportunities Unlimited, Inc. v. Board of Pub. Educ.***, 769 F. Supp. 1346 (W.D. Pa. 1991).

A school district was precluded by free speech principles from denying an evangelical Christian youth group the right to rent an auditorium (a designated public forum) for religious purposes (including religious worship and the distribution of religious literature). ***Gregoire v. Centennial Sch. Dist.***, 907 F.2d 1366 (3d Cir. 1990), *cert. denied*, 498 U.S. 899 (1990).

Where a school district had created a limited public forum in the use of its high school facilities by outside groups, Establishment Clause concerns were not sufficiently compelling to justify the district's exclusion of a church group that desired access on the same basis as other groups. ***Wallace v. Washoe County Sch. Dist.***, 818 F. Supp. 1346 (D. Nev. 1991).

Access to School-sponsored Print Media

Despite wide but selective access by advertizers to yearbooks, newspapers, and athletic programs, the court ruled that absent a school district's intent to create a public forum, such forums were nonpublic. The decision was 7-4, with four judges believing that a public forum was created by actual practice and that speech could not be rejected merely to avoid controversy. (The major justification for allowing the exclusion of advertizing submitted by Planned Parenthood, however, was not the "public forum doctrine"; the justification derived from the Supreme Court's decision in ***Hazelwood v. Kuhlmeier*** (484 U.S. 260, 1988), which the court said allowed the district to exercise reasonable control over the content of school-sponsored publications.) ***Planned Parenthood v. Clark County Sch. Dist.***, 941 F.2d 817 (9th Cir. 1991).

A school governing board created limited public forums in the advertizing sections of the student newspapers by permitting the general public to advertize relative to goods, services, or vocational opportunities. An anti-draft advertizement therefore could not be prohibited as "political" where other controversial and quasi-political ads had been accepted, viz military recruitment ads. Even if this were a non-public forum, such action would violate the First Amendment requirement barring discrimination on the basis of viewpoint. ***San Diego Comm. Against Registration and the Draft (CARD) v. Governing Bd.***, 790 F.2d 1471 (9th Cir. 1986).

Direct Access to Students for Literature Distribution or Discussion

Gideon International was denied permission to distribute Bibles in public schools during instructional time despite a written policy granting the superintendent and principals the right to allow community members to distribute literature. The Gideon's activity was not protected as a right of free speech, where school classrooms were not, in fact, public forums (or designated public forums). Furthermore, active participation by school officials gave the appearance of religious endorsement and entangled government with religion in violation of the Establishment Clause, a fact which the court suggested would obviate free speech rights in any case. ***Berger v. Rensselaer Cent. Sch. Corp.***, 982 F.2d 1160 (7th Cir. 1993).

The First Amendment would not permit a public school district to deny a peace group the opportunity to meet with students during a career day event because it disagreed with its views about the appropriateness of careers in the military. Furthermore, restricting access to the forum only to those with a present affiliation with the organization was unduly restrictive. ***Searcey v. Harris***, 888 F. 2d 1314 (11th Cir. 1989).

Attempts to bar individuals from distributing Gideon Bibles on a school-owned sidewalk in front of a high school violated the First Amendment freedom of speech provision, where the public had unrestricted access to the sidewalk and teachers were permitted to use the sidewalk for labor-related demonstrations. ***Bacon v. Bradley-Bourbonnais High Sch. Dist.***, 707 F. Supp. 1005 (C.D. Ill. 1989).

A criminal trespass conviction did not violate the defendant's free speech rights where he was arrested while attempting to distribute anti-abortion literature to high school students alighting from a bus onto a sidewalk inside the school campus. ***Reed v. State***, 762 S.W.2d 640 (Tex. Ct. App. 1988).

Organization seeking to provide students with information about legal alternatives to military service could not be kept out of high schools where military recruiters were allowed to speak and present information. The court applied the obligation of viewpoint neutrality under the First Amendment to the discriminatory access restrictions. ***Clergy and Laity Concerned v. Chicago Bd. of Educ.***, 586 F. Supp. 1408 (N.D. Ill. 1984).

Use of School Facilities or Channels of Communication for Access to Faculty

A school district may deny all employee unions access to school mail facilities as long as other avenues of communication remain available to the organizations. ***Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.***, 777 F.2d 1046 (5th Cir. 1985), aff'd, 470 U.S. 801 (1986).

Inter-school mail facilities had not become a limited public forum merely because community groups had been provided occasional access. Therefore, permitting exclusive access to bargaining representative (while denying access to a rival union) did not violate the First Amendment's free speech provisions. The government's only obligation in a non-public forum is the reasonable, viewpoint neutral regulation of speech. ***Perry Educ. Ass'n v. Perry Local Educators' Ass'n***, 460 U.S. 37 (1983).

Where a teachers' organization sought use of a school's internal mail system, the court held that the school district by policy had created a limited public forum for access by employee organizations. To thereafter limit the right to distribute recruitment literature to once a year would violate free speech provisions absent a compelling state interest that did not appear in the record. ***Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist.***, 720 F.2d 1429 (5th Cir. 1983).

Because a school parking lot was considered a non-public forum and because state law allowed the denial of access to those without "lawful business," the school district was within its rights to deny a rival union representative the right to pass out flyers. Such a denial was reasonable and not a pretext for viewpoint discrimination. ***Grattan v. Bd. of Sch. Commr's***, 805 F.2d 1160 (4th Cir. 1986).

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